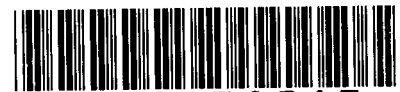


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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE COMPLAINT OF
BUREAU OF INDIAN AFFAIRS, UNITED
STATES OF AMERICA, AGAINST
MOHAVE ELECTRIC COOPERATIVE,
INC. AS TO SERVICES TO THE
HAVASUPAI AND HUALAPAI INDIAN
RESERVATIONS.

DOCKET NO. E-01750A-05-0579

**MOHAVE ELECTRIC
COOPERATIVE, INC.'S REPLY
CLOSING BRIEF**

Pursuant to the direction of Administrative Law Judge Teena Jibilian at the close of the rehearing of this matter on June 11, 2012, Respondent Mohave Electric Cooperative, Inc. ("Mohave"), by and through undersigned counsel, hereby submits its Reply Closing Brief replying to the issues raised by Complainant, Bureau of Indian Affairs ("BIA") and Commission Staff ("Staff") in their Initial Closing Briefs. As in Mohave's Initial Closing Brief, citations are to testimony and exhibits in the original November 18-20, 2008 hearing and to the June 11, 2012 rehearing in this matter.

I. Mohave's Agreement to Provide Service to BIA at Long Mesa and to Individual Accounts Along the 70-Mile Line in Settlement of this Long-Standing Dispute Does Not Result in an Extension of Mohave's CC&N Area.

Staff agrees with Mohave that Mohave's agreement to serve the BIA at Long Mesa and accounts along the 70-Mile Line should not lead to an extension of Mohave's Certificate of Convenience and Necessity ("CC&N"). Staff's Brief at 4. Moreover, despite not wishing to agree to such a term in the parties' settlement agreements, the BIA now does

1 not seek an extension of Mohave's CC&N and does not even discuss the issue in its filing.
2 Thus, the Commission should make it clear in its Decision on Rehearing that no extension
3 of Mohave CC&N has occurred by virtue of the settlement.

4 Instead of discussing the CC&N extension issue, the BIA argues that Mohave should
5 not be allowed to abandon the line at some indefinite time in the future without ACC
6 approval. Mohave has no intention of the abandoning the 70-Mile Line, and the settlement
7 terms, if approved by the Commission, together with securing access to the Line and
8 accounts, will allow Mohave to provide service as agreed. Arizona law provides that
9 Mohave "shall not" dispose of any part of its "line, plant or system necessary or useful in
10 performance of its duties to the public" without Commission approval. A.R.S. § 40-285(A).
11 However, there is no need or basis for the Commission to speculate about potential future
12 situations in which the Line no longer serves the existing accounts, including the BIA at
13 Long Mesa. Thus, the Commission should decline to include the BIA's proffered language
14 on potential abandonment of the Line in its Decision on Rehearing.

15 **II. The Commission Should Order that Mohave's Provision of Power to BIA at**
16 **Long Mesa for BIA's Distribution to Tribal Users in Supai Village Constitutes**
17 **Wholesale, Not Retail, Service.**

18 Staff agrees with Mohave that the BIA at Long Mesa is *not* a retail electric customer:
19 "because BIA receives power from Mohave that it then distributes to other customers, and
20 since Mohave does not read the meters down in the Supai Canyon, bill the customers in the
21 Canyon, [or] maintain the distribution line beyond the meter at Long Mesa[,] BIA qualifies
22 as a wholesale customer." Staff's Brief at 3, lines 18-21. The Staff is correct on this point,
23 and the Commission should hold that the BIA at Long Mesa is a wholesale customer, not a
24 retail customer, of Mohave.

25 None of the BIA's arguments support its contention that it receives retail service at
26 Long Mesa. The BIA asserts, for example, that "the BIA's 'business' or mission includes
27 enhancing the quality of life of Native Americans," and that therefore, in an example of
28 logical overreach, everything that the BIA does amounts to the retail use of electricity in its

1 business or “mission.” BIA’s Rehearing Closing Argument at 4, lines 24-25. Yet the BIA’s
2 own witness acknowledged that the BIA is “not a business.” 6/11/2012 Transcript at 111,
3 line 8-9. Further, the BIA’s argument that “The BIA does not resell, redistribute, or
4 retransmit the power” delivered at Long Mesa, BIA’s Rehearing Closing Argument at 5,
5 line 8-9, is belied by the testimony of BIA’s own witnesses. 6/11/2012 Tr. at 111, 113-14.
6 According to James E. Williams, “We [the BIA] distribute electricity that comes into Long
7 Mesa. Electricity goes into Supai and it is distributed to people living – there is a school,
8 clinic law enforcement service down there, as well as individual people living down there
9 receiving electricity. We meter their usage and they pay for their usage.” *Id.* at 111. As the
10 Staff notes, because the BIA distributes electricity to Supai residents and bills them for that
11 electricity, the BIA is a wholesale customer of Mohave. Staff’s Brief at 3.

12 The BIA’s argument that “MEC admitted that the BIA at Long Mesa is its retail
13 customer,” BIA’s Rehearing Closing Argument at 5, line 24, should be rejected. In the out-
14 of-context testimony cited by BIA, Mr. Tom Longtin mistakenly stated that he considered
15 the BIA “a retail customer” based on the rate it paid. 11/19/2008 Tr. at 297. However, the
16 rate charged has no place in the statutory definition of retail electric customer, which
17 focuses on resale and redistribution. A.R.S. § 40-201(21). For that reason, Mr. Longtin’s
18 mistaken testimony has no relevance. Similarly, the question of whether the 1981 contract
19 between Mohave and BIA uses the term “wholesale,” or the classifications used in REA
20 filings, have no relevance to the statutory definition. The BIA cannot dispute the facts that
21 the BIA itself steps down the power provided on a wholesale basis by Mohave, that BIA
22 then transmits power from Long Mesa through lines owned and maintained by the BIA for
23 use by customers in Supai, whom the BIA meters and bills. Therefore, the BIA is a *not* a
24 retail electric customer at Long Mesa.

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1 **III. Mohave Cannot Provide Electric Service Through the 70-Mile Line Unless**
2 **Mohave Receives Easements on Reasonable Terms to Operate and Maintain the**
3 **Line.**

4 On the easement issue, the Staff again agrees with Mohave: “Mohave must be given
5 access to the line and must be able to obtain easements pursuant to A.A.C. R14-2-206(C)(1).
6 In short, it appears that Mohave is merely seeking to include language in the settlement that
7 already applies pursuant to the Arizona Administrative Code.” Staff’s Brief at 2. Rather
8 than acknowledge that Mohave has simply requested that the normal regulations on
9 easements apply, the BIA asserts that the Commission cannot and should not “make such a
10 hypothetical and advisory finding.” BIA’s Rehearing Closing Argument at 2. The BIA then
11 cited numerous cases for the proposition that “Advisory decisions and opinions are to be
12 avoided.” *Id.*

13 The BIA’s argument betrays a fundamental misunderstanding of Commission’s
14 nature, jurisdiction and power. All of the cases cited by the BIA involve limitations on the
15 powers of courts. *See, e.g., McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 353 n.7, 63
16 P.3d 1082, 1088 n.7(App. 2003)(“*Courts* should not render advisory opinions”)(emphasis
17 added); *Citibank (Arizona) v. Miller & Schroeder Financial, Inc.*, 168 Ariz. 178, 182, 812
18 P.2d 996, 1000 (App. 1991)(“*Courts* should not render advisory opinions”)(emphasis
19 added); *Armory Park Neighborhood Assn. v. Episcopal Community Services in Arizona*, 148
20 Ariz. 1, 6, 712 P.2d 914, 919 (1985)(“We impose [judicial] restraint to insure that our *courts*
21 do not issue mere advisory opinions”)(emphasis added). However, the Commission is *not* a
22 court.

23 Rather, the Commission, as a separate and popularly-elected branch of state
24 government, “is a constitutional body which owes its existence to the provisions of the
25 organic law of this state.” *Miller v. Arizona Corporation Commission*, 227 Ariz. 21, 24, 251
26 P.3d 400, 403 (App. 2011). Under the Arizona Constitution, the Commission has authority
27 to “make reasonable rules, regulations and orders” to govern public service corporations.
28 Ariz. Const., art. 15, § 3. Moreover, the Arizona legislature may “enlarge” the
Commission’s powers by legislation. Ariz. Const., art. 15, § 6. The legislature then

1 statutorily enlarged that power, providing that “The commission may supervise and regulate
2 every public service corporation in the state and do all things, whether specifically
3 designated in this title or in addition thereto, necessary and convenient in the exercise of that
4 power and jurisdiction.” A.R.S. § 40-202(A).

5 As held by the Arizona courts, “The Commission possesses judicial, executive and
6 legislative powers. . . . It exercises its executive, administrative function in adopting rules
7 and regulations, its judicial function in adjudicating grievances, and its legislative function
8 in ratemaking.” *Miller*, 227 Ariz. at 25, 251 P.3d at 404 (citations and quotation marks
9 omitted); *see also Arizona Corporation Commission v. State ex rel. Woods*, 171 Ariz. 286,
10 291, 830 P.2d 807, 812 (1992)(same). As stated by the Arizona Supreme Court, the
11 Commission has “full power to regulate, set rates, and make reasonable rules for public
12 service corporations.” *Id.* at 290, 251 P.2d at 811 (quotation marks removed).

13 Thus, the BIA’s argument that the Commission lacks the power or should refrain
14 from issuing “advisory decisions,” BIA’s Rehearing Closing Argument at 2, has no merit.
15 The Commission has the power to issue regulations such as A.A.C. R14-2-206(C)(1) and
16 likewise has the jurisdiction to include Mohave’s requested language on the need for
17 easements in the Decision on Rehearing.

18 The Commission should also reject the BIA’s arguments that “The Line does not
19 present any unique problems” and “History proves that extension of the easements almost
20 certainly will not present any unique problems.” BIA’s Rehearing Closing Argument at 2.
21 Rather, the Line *is* unique – crossing 70 miles of sparsely-inhabited land over territory of
22 three sovereign tribes, unlike any other line owned or operated by Mohave. The BIA’s own
23 witness has testified that tribal governments change, that past history cannot predict the
24 future, and that a written easement is essential for Mohave to operate and maintain the Line.
25 6/11/2012 Tr. at 122-23. Moreover, Mohave’s witnesses have testified as to the problems
26 created when Mohave lacks easements on tribal lands. 6/11/2012 Tr. at 23-24, 77. The
27 Commission should include Mohave’s suggested language, which (as the Staff notes)
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1 conforms with Commission regulations, to ensure that problems do not arise in the future,
2 and to make certain the terms and conditions under which Mohave has agreed to provide
3 service.

4 Finally, the Commission should reject the BIA's claim that inclusion of the language
5 on easements "could result in relitigating matters already agreed upon by the parties."
6 BIA's Rehearing Closing Argument at 3. Clearly, the issue of easements has not been
7 already agreed upon by the parties – that is why it has been included in the parties' Joint
8 Submission of Issues on Which the Parties Continue to Disagree. The BIA refuses to
9 acknowledge that Mohave needs legal access to the Line and the accounts, although the BIA
10 offers no suggestions as to how Mohave could conceivably provide the service it is willing
11 to provide in the settlement agreements without such access. Moreover, inclusion of
12 Mohave's proposed language would not "provide MEC with a means to once again abandon
13 the Line without ACC approval." BIA's Rehearing Closing Argument at 3-4. Access has
14 nothing to do with abandonment. This is a reasonable condition that is consistent with what
15 Staff acknowledges must be present for Mohave to serve. It is completely consistent with
16 A.A.C. R14-2-206(C)(1) and should be included in the Decision on Rehearing.

17 CONCLUSION


18 For the foregoing reasons, the reasons presented in Mohave's Initial Closing Brief,
19 and the reasons presented at the rehearing on June 11, 2012, the Commission should include
20 language in the Decision on Rehearing on this matter specifically finding that (1) Mohave's
21 agreement to provide service to the BIA at Long Mesa and to the individual accounts along
22 the 70-Mile Line does not result in an extension of Mohave's CC&N; (2) Mohave's
23 provision of power to the BIA at Long Mesa for distribution by the BIA to users in Supai
24 Village constitutes wholesale, not retail, service; and (3) Mohave's agreement to provide
25 electric service through the 70-Mile Line is conditioned upon Mohave receiving easements
26 on reasonable terms to operate and maintain the Line.

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1 RESPECTFULLY SUBMITTED this 6th day of August, 2012.

2 BRYAN CAVE LLP

3
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11 **ORIGINAL and 13 COPIES** of the
12 foregoing were hand-delivered for
13 filing this 6th day of August, 2012, to:

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17 Phoenix, AZ 85007

18 **COPY** of the foregoing hand-delivered
19 this 6th day of August, 2012, to:

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